

APPELLATE PRACTICE SECTION
Respectfully submits the following position on:

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ADM File No. 2014-09

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The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan.

The State Bar position on this matter is to take no position on the proposed amendments to MCR 7.215(A) and MCR 7.215(B); to oppose the proposed amendments to MCR 7.215(C) for the reasons stated in Justice Markman's dissent; and to authorize Sections and Committees to transmit non-conflicting positions to the Court.

The total membership of the Appellate Practice Section is 816.

The position was adopted after electronic and telephonic discussion, and vote taken by scheduled special meeting by phone on May 21, 2015. The number of members in the decision-making body is 23. The number who voted in favor to this position was 13. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Appellate Practice Section

Contact person:

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Proposed Court Rule or Administrative Order Number:

[2014-09 - Proposed Amendment of MCR 7.215](#)

The proposed amendments of MCR 7.215(A)-(C) were submitted by the Court of Appeals. Proposed MCR 7.215(A) would clarify the term “unpublished” as used in the rule. The proposed amendment of MCR 7.215(B) would provide more specific guidance for Court of Appeals judges regarding when an opinion should be published. Finally, in response to what the Court of Appeals describes as an increased reliance by parties on unpublished opinions, the proposed revision of MCR 7.215(C) would explicitly note that citation of unpublished opinions is disfavored unless an unpublished decision directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.

Date position was adopted:

May 21, 2015

Process used to take the ideological position:

Position adopted after electronic and telephonic discussion, and vote taken by scheduled special meeting by phone on May 21, 2015.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

13 Voted for position

0 Voted against position

0 Abstained from vote

10 Did not vote (absent)

Position:

Oppose with recommended amendments

Explanation of the position, including any recommended amendments:

See attached letter



The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2014-09_2015-02-18_formatted%20order_with%20SJM%20stmt%20with%20RC.pdf

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May 21, 2015

Larry S. Royster
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Re: ADM File No. 2014-09 – Appellate Practice Section Comment on Proposed Amendments of Michigan Court Rule 7.215

Dear Mr. Royster:

I write on behalf of the Appellate Practice Section to comment on the proposed amendments to MCR 7.215. The Section thanks the Court of Appeals Rules Committee for inviting representatives of its Council to attend the meeting of the Rules Committee on April 28. Attending that meeting gave us a valuable insight into the Court's goals in proposing those amendments. In particular, we were pleased to learn that the proposed amendments to MCR 7.215(A) and (B) are intended to reduce ambiguity and encourage the publication of more opinions, which the Section has long advocated. We also support the Rules Committee's goal of improving written appellate advocacy.

The Appellate Practice Section does not, however, support the proposed amendment to MCR 7.215(C), and the Section Council voted unanimously to oppose it. Published or not, an opinion issued by a panel of three Michigan Court of Appeals judges is an opinion of the court. It should be treated as authoritative, even though it is not binding on future panels, much like treatises, Restatements, and foreign case law. In many unpublished opinions, the Court of Appeals has decided matters of first impression or applied binding precedent to new factual contexts. Consequently, attorneys, their clients, and even federal courts reasonably rely on such decisions as indicative of Michigan law. The Court of Appeals itself has relied on its unpublished decisions as persuasive authority. Most troublesome, a rule discouraging citation to unpublished opinions could suggest that such decisions are not worthy of respect because they do not accurately state or apply the law.

We recognize that the Court's proposed language does not prohibit citation to unpublished opinions, but rather only "disfavors" citation unless an explanation is provided. While the Appellate Practice Section agrees that explaining the citation to unpublished authority is the best practice in written advocacy, it should not be mandated in a court rule for the following reasons:

1. Sound judgment in determining what to argue or what explanation to provide in a brief requires the exercise of discretion on the part of appellate counsel. Trying to translate that judgment into hard and fast rules takes discretion away from appellate counsel and is more likely to hinder rather than enhance appellate advocacy.

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2. The proposed requirement that the brief explain "why existing published authority is insufficient to resolve the issue" is ambiguous. What sort of explanation is adequate? Does counsel have to provide a paragraph for each published case addressing the issue and explain why that case does not control the outcome in this appeal? The proposed rule could result in longer briefs, not better advocacy. The ambiguity emphasizes the point that the substantive content of briefs should not be mandated.
3. Using the word "disfavored" instead of "prohibited" does not resolve the problem of inserting guidance on written advocacy into a court rule. Any violation of a rule is subject to sanction under MCR 7.216(C)(1)(b).
4. Good appellate advocates already cite unpublished authority sparingly, and explain why they are doing so. Both the existing rules and the risk of failing to persuade the court already encourage reliance on binding precedent, and discourage reliance on non-binding authority except where there is no binding precedent that supports the party's position (at least not as well as the unpublished opinion). Counsel who cite an unpublished opinion as if it were binding either have not read MCR 7.215(C) or do not understand the concept of stare decisis, and amending the proposed language is unlikely to correct these deficiencies.
5. Complementary to the rule of stare decisis, the adversarial process itself further encourages practitioners to address and rely on binding precedent. If the appellant cites unpublished authority because published authority runs contrary to the result they desire, the opposing party will almost certainly cite that binding precedent. The appellant would be foolhardy not to distinguish that authority in reply.

If the Court still believes that it is appropriate to require an explanation of why unpublished authority is being cited, the Appellate Practice Section proposes the following language as an alternative to mitigate the above concerns and accomplish the Court of Appeals' goal of improving written appellate advocacy:

Unpublished opinions should not be cited for propositions of law for which there is binding authority. If a party cites an unpublished opinion, the party should explain the reason for citing it and why it is relevant.

The Appellate Practice Section believes this would be sufficient to address the Court's concerns.

To reiterate, the Appellate Practice Section opposes inserting language into a court rule mandating an explanation of why unpublished authority is being cited, and suggests that the Court use other means to encourage better practices in written appellate advocacy. In the event the Court believes a rule is appropriate, we suggest the language set out just above.

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We appreciate the Court's attention to our comments.

Very truly yours,



Nancy Vayda Dembinski

Chair, Appellate Practice Section